cellular resale. Sprint's chain of reasoning is sufficient only to show that if one assumes BST will commit cross-subsidy, one can conclude that BST will commit cross-subsidy.

Some commenters take issue with BellSouth's contention that cross-subsidization of structurally unseparated resale is virtually impossible due to the fact that BST will buy service at the same wholesale rates that are available to others. MCI, for example, claims that there is no way to know what those rates are, or that they are equally available, given that cellular rates are no longer subject to tariff.[85]

The wholesale rates are set by the underlying cellular carrier, not by the reseller, and the underlying carrier is obligated to provide the same service to others at the same rates as it charges BST, consistent with that carrier's duty not to discriminate, pursuant to 47 U.S.C. § 202(a). While MCI is correct that the underlying carrier's rates are not tariffed, that carrier is nevertheless obligated to make the same rate available to other similarly situated resellers both under § 202(a) and the Commission's cellular resale policies. Any well-informed cellular reseller will be familiar with the two facilities-based carriers' rate structures through negotiations for purchase of system capacity. The number of highly sophisticated, high-volume cellular resellers is increasing rapidly: MCI is now the nation's largest reseller, and PCS licensees are likely to become major resellers of cellular service.[86] There is little likelihood that a facilities-based cellular carrier would even try to implement a discriminatory wholesale cellular pricing scheme, favoring an affiliated LEC reseller that is subject

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[85] MCI Comments at 10.

[86] Given the high-volume cellular resale that will occur as major companies such as MCI and PCS licensees such as AT&T and Sprint begin massively reselling cellular service, there is little danger that there will be "no other significant resale purchasers at the 'wholesale for resale' price" paid to the cellular licensee by BST, as Sprint suggests (Sprint Comments at 2 n.5).

to pervasive regulation and oversight at the state and federal level,[87] and there is *no* chance such a scheme could succeed undetected.[88]

As the foregoing discussion shows, the opponents of BellSouth's proposal have presented *no* grounds for any concern that structurally unseparated resale by BST or BPCI is likely to be cross-subsidized. The Commission has repeatedly authorized the joint provision of wireless and wireline service.[89] If cross-subsidization was in fact likely to occur, surely it would have come to the Commission's attention by now. Nevertheless, the opponents of the Resale Request can point to no findings that structurally unseparated LEC wireless services have ever been cross-subsidized. In light of this fact, there is little or no likelihood that BellSouth's cellular resale will be cross-subsidized.

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[87] BellSouth notes that if the underlying carrier is BMI or an affiliate, the contract between BST and the cellular carrier must be in writing and available for Commission inspection; this will facilitate prompt resolution of charges that the wholesale rate is discriminatory and a vehicle for cross-subsidization. If, on the other hand, the underlying cellular carrier is not a BellSouth affiliate, the wholesale rate paid by BST provides no opportunity for cross-subsidization of cellular service.

[88] In this connection, BellSouth notes that BMI is the supplier of bulk cellular capacity to MCI for resale in the BellSouth region.

[89] The Commission has authorized GTE and independent telephone companies to provide cellular and wireline service without structural separation in the MSAs, RSAs, and unserved areas, it has authorized all LECs to provide PCS without structural separation, and it has authorized all LECs to provide SMR service without structural separation. *See Cellular Communications Systems*, CC Docket 79-318, *Memorandum Opinion & Order on Recon.*, 89 F.C.C.2d 58, 79 (1982); *PCS Second Report and Order*, 8 F.C.C.R. at 7751; *SMR Eligibility*, 10 F.C.C.R. at 6300.

CERTIFICATE OF SERVICE

I, Phyllis F. Martin, do hereby certify that I have, on this 25th day of September, 1995, served by first class mail, postage prepaid, a copy of the foregoing Comments In Response to Request for Resale Authorization to the following:

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February 15, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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Re: Response to Cox et al. Letter on Structural Separation and *BellSouth Corporation v. FCC*, Case Nos. 94-4113, 95-3315, consolidated with *Cincinnati Bell Telephone Co. v. FCC*, Case Nos. 94-3701/4113, 95-3023, 3238, 3315 (6th Cir. Nov. 9, 1995) ("Cincinnati Bell"), Gn. Docket 90-314

Dear Mr. Kennard:

On January 18, 1996, Cox Enterprises, Inc., Comcast Corporation, and AirTouch Communications, Inc. ("Cox") urged commencement of a broad rulemaking proceeding looking toward the imposition of structural separation requirements on the Local Exchange Carrier ("LEC") provision of PCS and cellular service. Cox states that its position is compelled by the 6th Circuit's ruling in *Cincinnati Bell v. FCC*, 679 F3d 752 (6th Cir. 1995). Letter at 2.

Quite simply, Cox is wrong. The Court granted BellSouth's petition for review which sought *relief* from the cellular structural separation rule, not its continuation and imposition on PCS. The 6th Circuit held that given the Commission's rulings that (i) imposition of a structural separation rule on PCS would disserve the public interest and (ii) its treatment of PCS and cellular as essentially the same services (e.g., cellular/PCS cross-ownership restriction), the Commission's retention of the cellular separate subsidiary rule was arbitrary and capricious. The Court remanded the case so that the FCC could revisit its ruling "promptly." The court added that "time is of the essence" because each day that passes the RBOCs are competitively injured by the rule given the ongoing PCS auction and build-out process. In short, the Court found that the cellular rule had no discernable basis or purpose and directed the Commission to move with dispatch to revisit it. See, 69 F.3d at 767 Thus, the Cox position that the FCC hold a full unexpedited rulemaking proposing structural separation for PCS and cellular is at odds with the Court's mandate.

Ironically, Cox' position is nothing more than a rehash of positions rejected in the just completed PCS rulemaking reviewed by the 6th Circuit. In essence, Cox urges that the FCC should impose a separate subsidiary requirement on PCS. In the PCS proceeding, Cox' and Comcast's comments advocating a PCS structural separation requirement were fully considered, along with the many commenters supporting the Commission's proposal not to impose a structural separation requirement. Ultimately, the FCC disagreed with Cox and Comcast. The FCC squarely found that letting local exchange carriers provide PCS together with local phone

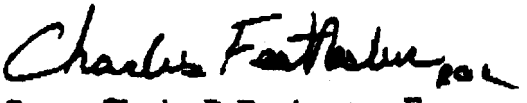
service benefits the public by producing economies of scope, promoting more rapid service development, yielding a wider range of services, and developing wireline telephone architecture better suited to wireless service. See, *Second Report*, 8 FCC Rcd at 7751. It also found that its concerns about anti-competitive behavior were adequately addressed by its cellular-PCS cross-ownership policies. *Id.* If Cox believed these findings were legally erroneous, it should have appealed the FCC's ruling. It did not do so. One final irony. If Cox succeeds in reopening structural separation on a broad basis, it will necessarily entail an examination of Cox itself and whether a structural separation would be appropriate given their entrenched position in the cable industry.

To change positions now, as Cox urges, immediately after the Court's ruling that the FCC did not go far enough in granting structural separation relief will create additional problems on judicial review. See *Office of Com. of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) ("[A]brupt shifts in policy do constitute danger signals that the Commission may be acting inconsistently with its statutory mandate.") There is no record of after-developed facts following the PCS rulemaking which would support a major policy shift. Cox admits that the purpose underlying the cellular separate subsidiary rule relate only to possible interconnection and cross-subsidiary abuse. For example, we know of no case where the Commission has found GTE, which has no separate subsidiary requirement, guilty of interconnection or cross-subsidy abuse by its LECs in favor of its wireless operations. Moreover, the FCC has recently found that there have been no abuses in recent memory in the *cellular* area by any LEC. See, *Eligibility for the Specialized Mobile Radio Service*, 10 FCC Rcd. 6280 (1995). The FCC's burden is further heightened by the fact that PCS operators connected with LECs have made billion dollar investments to win licenses in the FCC auctions and are spending more to construct PCS systems, all predicated upon the Commission's decision not to impose the extraordinary costs associated with structural separation. These companies have substantially relied on the PCS ruling. Accordingly, to bring closure to the original PCS rulemaking and the industry's reliance thereon, the Commission should not entertain Cox' rehash of its rejected structural separation position.

BellSouth urges the FCC to comply with the Court's mandate by eliminating the cellular structural separation rule expeditiously.

Sincerely,

BellSouth Corporation



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cc: Michele Farquhar, Room 5002
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CERTIFICATE OF SERVICE

I, Phyllis F. Martin, do hereby certify that I have, on this 3rd day of October, 1996, served by hand delivery, a copy of the foregoing BellSouth Comments in WT 96-162 to the following:

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